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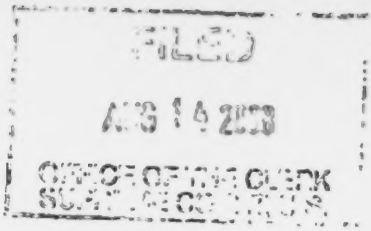

No. 07-1562

In The
Supreme Court of the United States

JANE H. CHUN, et al.,

Petitioners,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of New Jersey

BRIEF FOR THE STATE OF NEW JERSEY IN OPPOSITION

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August 14, 2008

QUESTION PRESENTED

Whether the New Jersey Supreme Court's judgment that foundational documents attesting to the calibration and maintenance of breath testing instrumentation are not "testimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004), a ruling consistent with nearly unanimous reported authority across the country, should be disturbed?

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OPINION BELOW

The judgment of the New Jersey Supreme Court is reported at *State v. Chun*, 194 N.J. 54, 943 A.2d 114 (2008).

STATEMENT OF THE CASE

This state court litigation involved lengthy proceedings addressing the scientific reliability of the Draeger Alcotest 7110 MKIII-C (Alcotest) breath testing instrument. The matter arose upon consolidation of petitioners' pending drunken driving cases. After two remands to a designated special master, who held hearings and filed findings and conclusions, the Supreme Court of New Jersey determined that the Alcotest was scientifically reliable, and that breath test results obtained from this instrument were admissible in evidence in driving while under the influence (DWI) prosecutions in New Jersey.

In conjunction with its reliability ruling, the state supreme court also addressed the issue of whether documentary evidence relating to the working order of the Alcotest and its components could be introduced without the testimony of the preparer. The court held that admission of these documents pursuant to the well-established "business records" hearsay exception did not violate the Sixth Amendment *Confrontation Clause* because the documents were not "testimonial" as defined by *Crawford v. Washington*, 541 U.S. 36 (2004). *State v. Chun*, 194 N.J. at 140-148, 943 A.2d at 165-171. The Supreme Court of New Jersey vacated the stays it had imposed pending resolution of the Alcotest's reliability, and remanded petitioners' cases for further proceedings consistent with its opinion. Id., 194 N.J. at 149-54, 943 A.2d at 170-175.

Petitioners seek a writ of *certiorari* on the *Confrontation Clause* issue.

REASONS FOR DENYING THE PETITION

The Judgment Of The New Jersey Supreme Court Is Not A "Final Judgment Or Decree" Under 28 U.S.C. Sec. 1257(a), Nor Does It Satisfy Any Of The Limited Exceptions To The Finality Rule.

Petitioners approach this Court at a pretrial stage. They acknowledge that their individual cases "have not yet been finalized," having been remanded to a lower court for disposition of the pending DWI charges. (Petition at 20). Petitioners nevertheless argue that "the holding of the New Jersey Supreme Court is final as to the issues raised in this petition." (Petition at 20). Petitioners' assertion does not address the relevant question determining jurisdiction.

Generally, the Court is precluded from reviewing a state decision "if there is anything further to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). This requirement also has been stated in terms of exhaustion, where the Court properly has jurisdiction if the defendant has been convicted, has had his conviction affirmed, and has at least petitioned for discretionary review in the state's highest court. *Douglas v. California*, 372 U.S. 353, 354 n.1, *reh'g denied*, 373 U.S. 905 (1963).

While there are four exceptions to the general finality rule, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), none of these exceptions applies to create jurisdiction in this case. *See Johnson v. California*, 541 U.S. 428, 429-431 (2004) (dismissing petition for a writ of *certiorari* for lack of jurisdiction, as the lower court's remand order was not final); *Florida v. Thomas*, 532 U.S. 774, 777 (2001) (remand to trial court was not

a final judgment for jurisdictional purposes). *Compare Kansas v. Marsh*, 548 U.S. 163, 168-169 (2006) (on state's appeal, lower court's remand order was final because "later review of the federal issue [could not] be had, whatever the ultimate outcome of the case." (quoting *Cox*, 420 U.S. at 481)).

Given the procedural posture of petitioners' cases, the New Jersey Supreme Court's disposition of the *Crawford* issue is not necessarily outcome determinative, in that, at trial, petitioners could be acquitted, or convicted on evidence independent of the Alcotest test results. *See State v. Bealor*, 187 N.J. 574, 588, 902 A.2d. 226, 235 (2006) ("[E]ven in the absence of expert proofs of a defendant's blood alcohol concentration, a conviction for driving while under the influence of alcohol will be sustained on proofs of the fact of intoxication--a defendant's demeanor and physical appearance--coupled with proofs as to the cause of intoxication--*i.e.*, the smell of alcohol, an admission of the consumption of alcohol, or a lay opinion of alcohol intoxication.") (citations omitted); *State v. Sisti*, 209 N.J. Super. 148, 150, 506 A.2d 1307, 1309 (App. Div. 1986) ("For guidance in the future of municipal court judges, however, we note that in N.J.S.A. 39:4-50 cases where there are proofs of guilt, with and without breathalyzer readings, the judge should make findings and conclusions on both bases"). Even if petitioners are convicted based upon their breath test readings, they still will have the opportunity to seek review of their convictions, and of the *Crawford* issue, up to and including the filing of a petition for *certiorari*, in their individual cases. Nor would this Court's refusal to review the New Jersey Supreme Court's decision at this juncture in any way "seriously erode federal policy." *Johnson*, 541 U.S. at 430. Consequently, petitioners have not established a valid claim of jurisdiction under 28 U.S.C. Sec. 1257(a).

Petitioners' Pending DWI Cases Are Quasi-Criminal, Motor Vehicle Violations And The New Jersey Supreme Court Expressly Left Open The Issue Of Whether The *Confrontation Clause* Applies To This Class Of Offenses.

In addition to the pretrial procedural status of petitioners' cases and the consequent lack of final judgment for purposes of this Court's review, there is another factor relevant to the issue of finality. Through its adjudication of one aspect of the *Crawford* issue, the New Jersey Supreme Court has chosen to leave open the question of *Crawford's* applicability to DWI offenses.

By its express terms, the Sixth Amendment confrontation right applies to "all *criminal* prosecutions." But petitioners are not being criminally prosecuted. Rather, they stand charged with violations of N.J.Stat.Ann. 39:4-50. Title 39 is New Jersey's Motor Vehicle Code. In New Jersey, motor vehicle violations, including DWI offenses, are not crimes. Intoxicated driving is an offense of quasi-criminal nature, tried in municipal courts, which are courts of limited jurisdiction. *See, e.g., Pressler, Current N.J. Court Rules, R.* 7:1 (motor vehicle laws fall within municipal court jurisdiction).

For purposes of addressing the foundational documents relating to the Alcotest's working order, the parties assumed, without analysis, that *Crawford* has direct application to quasi-criminal, motor vehicle violations. The focus was on the nature of the documents, not the nature of the offense. However, the Supreme Court of New Jersey steadfastly has reserved its right to explore this critical distinction. While deciding to address *Crawford* in the course of affirming the Alcotest's scientific reliability, the state supreme court expressly noted that, in light of how it was

resolving the documentary issue, the court was not addressing the more fundamental question of whether the *Confrontation Clause* even applies to DWI cases. *State v. Chun*, 194 N.J. at 137, 943 A.2d at 144 n.41 ("[W]e have not specifically held that the *Confrontation Clause* applies to quasi-criminal proceedings or that it applies generally to DWI matters. . . . In light of the manner in which we have addressed the potential impact of *Crawford* on the evidence we here consider, we need not directly consider this constitutional question"). *See, also, State v. Sweet*, 195 N.J. 357, 949 A.2d 809, 818 n. 9 (2008) ("We acknowledge here, as we did in *Chun*, that 'we have not specifically held that the *Confrontation Clause* applies to quasi-criminal proceedings or that it applies generally to DWI matters'").

Since this case involves motor vehicle offenses, it is a poor candidate for analysis of a federal constitutional right applicable to criminal prosecutions, particularly when the state supreme court clearly has signaled its view that the offense distinction is potentially meaningful in these circumstances. *See also Peters v. State*, 2008 Fla. LEXIS 757, *reh'g denied*, 2008 Fla. LEXIS 1167 (2008) (revocation of probation proceedings are not "criminal prosecutions" and, therefore, *Crawford* does not apply). Cf. *Blanton v. North Las Vegas*, 489 U.S. 538 (1989) (no Sixth Amendment right to jury trial for Nevada DUI offense due to "petty" classification). Since the Supreme Court of New Jersey has preserved the possibility of addressing the quasi-criminal, motor vehicle offense designation in the future, a resolution of the *Crawford* implications of breath test instrument maintenance documents ultimately may not be dispositive for DWI prosecutions in New Jersey. Consequently, there is no compelling legal or practical reason to grant *certiorari*.

Petitioners Seek An Unprecedented And Unjustified Expansion Of What Is A "Testimonial" Statement, Beyond This Court's Interpretation Of The Parameters Of The *Confrontation Clause* And Contrary To The Published Authority Of Practically Every Court That Has Addressed Instrument Maintenance Documents In This Context.

Petitioners request that the Court broaden the reach of the *Confrontation Clause* to capture maintenance and quality control records of the Alcotest. Such an expansion is wholly unwarranted. The concerns identified by *Crawford v. Washington* and subsequent related decisions of this Court simply are not implicated by routine certifications relating to a breath testing instrument's working order. These foundational documents are not directed at establishing the facts of past crimes, do not accuse defendants in intoxicated driving cases, are not created for the purpose of prosecuting a particular defendant, and are not substantive evidence of an element of the DWI offense. They can exonerate, as well as inculpate, suspected drunken drivers. They constitute nontestimonial evidence admissible pursuant to long-standing exceptions to the hearsay rule. The evidentiary use of these documents, without the testimony of the preparer, is consistent with the *Confrontation Clause*.

In *Crawford*, the Court first gave an indication of the type of statements that would fall into the definition of "testimonial" :

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a

> former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed.
>
> [*Id.*, 541 U.S. at 68].

This Court gave some examples, such as depositions taken by coroners and *ex parte* judicial examinations, which translate today to pretrial proceedings involving the examination of witnesses under oath and cross-examination, police interrogations, and grand jury testimony. *Crawford v. Washington*, 541 U.S. at 51-52. Significantly, the Court recognized that most firmly rooted hearsay exceptions "covered statements that by their nature *were not testimonial -- for example, business records* . . ." *Crawford v. Washington*, 541 U.S. at 56(emphasis supplied); *State v. Chun*, 194 N.J. at 139, 943 A.2d at 165 (commenting upon "the Court's apparent exclusion of all business records from the Constitution's protective scope"). There is a significant practical component to keeping business records nontestimonial: "To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

Breath test results are admissible in New Jersey if the breath testing instrument is: (1) in proper working order, (2) administered by a qualified operator, and (3) used in accordance with accepted procedure. *Romano v. Kimmelman*, 96 N.J. 66, 82, 474 A.2d 1, 10 (1983). New Jersey, consistent with the approach of many other jurisdictions, long has categorized breath test maintenance documents, such as periodic inspection certificates, as business or public records. *State v. Cleverley*, 348 N.J. Super. 455, 459,

792 A.2d 457, 459 (App. Div. 2002); *State v. McGeary*, 129 N.J. Super. 219, 226-28, 322 A.2d 830, 833-835 (App. Div. 1974). See *State v. Sweet*, 195 N.J. at 26, 949 A.2d at 817 ("It is plain that those certificates represent records of regularly conducted activity and therefore qualify under the business records exception [*N.J. Rules of Evidence* 803(c)(6)] to the hearsay rule"); *State v. Chun*, 194 N.J. at 141, 943 A.2d at 166 ("these documents fall squarely within the traditional business records exception"). *Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . , as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether"). State Police protocols for testing breath test instruments meet the standards for admissibility of results in terms of objectivity, regularity, and routine quality, and no motive exists to single out a specific analysis for the purpose of rendering an unjust report. *State v. Garthe*, 145 N.J. 1, 13 , 678 A.2d 153, 159 (1996); *State v. Cleverley*, 348 N.J. Super. at 459, 792 A.2d at 459; *State v. McGeary*, 129 N.J. Super. at 225, 332 A.2d at 833 ("It is not only important to and in the interests of a defendant that the [breath test device] be in proper operating order, but it is equally important to and in the interest of the State and the citizens thereof"). The documents, as business records, are admissible in evidence.

Since the individuals who certify the instruments and their components have no knowledge of any specific future cases, and generally are inspecting as a matter of routine to ensure both accuracy and compliance with rules and regulations imposed upon them, they lack any motive or incentive to misrepresent facts. There is no nexus between their quality control and a particular result in a particular case. *See State v. Huggins*, 659 P.2d 613, 616 (Alaska Ct. App. 1982); *Bohsancurt v. Eisenberg*, 129 P.3d 471, 472, 475-76 (Ariz. Ct. App.), *rev. denied*, 2006 Ariz.

LEXIS 111 (2006) ("maintenance records are not created in anticipation of litigation, but rather for the purpose of complying with rules and assuring the accuracy of testing devices . . ."); *Pflieger v. State*, 952 So. 2d 1251 (Fla. Dist. Ct. App. 2007); *Rackoff v. State*, 637 S.E.2d 706, 709 (Ga. 2006); *People v. Kim*, 859 N.E.2d 92, 93-94 (Ill. App. Ct. 2006), *app. denied*, 871 N.E.2d 60 (Ill. 2007); *Jarrell v. State*, 852 N.E.2d 1022, 1026 (Ind. Ct. App. 2006); *Napier v. State*, 827 N.E.2d 565, 569 (Ind. Ct. App. 2005), *cert. denied*, 546 U.S. 1215 (2006); *State v. Ruiz*, 903 P.2d 845, 848-49 (N.M. Ct. App.), *cert. denied*, 903 P.2d 240 (N.M. 1995); *Green v. DeMarco*, 812 N.Y.S.2d 772, 782-83 (N.Y. Sup. Ct. 2005) (breath test calibration certificates "are the antithesis of the testimonial evidence that is the focus of *Crawford*," and "[i]t matters not that they may have an incidental litigation purpose"); *State v. Shisler*, 2006 Ohio App. LEXIS 5251 (Ohio Ct. App. 2006) (although breath test certificate was prepared in recognition of the fact that it may later be used in a prosecution, to comply with administrative code requirements such testing would have occurred even absent any charges against drunk drivers); *State v. Norman*, 125 P.3d 15, 19 (Or. Ct. App. 2005), *rev. denied*, 132 P.3d 28 (Or. 2006) (inspection certificates ensured "that the machines operated properly and provided accurate readings before and after defendant's test . . .").

Breath test maintenance records are systematic, neutral certificates of objective facts. There is nothing accusatory about these documents. The use of certificates documenting inspections, calibrations, *etc.*, in court does not render them testimonial. They involve ministerial, administrative tasks aimed at quality control that is divorced from the adversarial context of investigating and prosecuting individual defendants. *People v. Krueger*, 804 N.Y.S.2d 908 (Justice Court 2005) (Alcotest foundational documents are not testimonial under *Crawford*; they are not specifically made for the prosecution of a particular case).

A number of states have addressed application of *Crawford's* "testimonial" definition to breath alcohol testing instrument maintenance and inspection certificates, and all but one have declared such certificates to be nontestimonial, and therefore admissible at trial, without their preparer's testimony. *State. Chun,* 194 N.J. at 143, 943 A.2d at 167 (listing cases); *State v. Dukes*, 174 P. 3d 914 (Kan. App. 2008) (also listing court decisions of various jurisdictions). *See, e.g., Abyo v. State*, 166 P.3d 55, 59-60 (Alaska Ct. App. 2007); *Bohsancurt v. Eisenberg*, 129 P.3d 471, 472, 475-82 (Ariz. Ct. App.), *rev. denied*, 2006 Ariz. LEXIS 111 (Ariz. 2006); *Pflieger v. State*, 952 So. 2d 1251, 1253-54 (Fla. Ct. App. 2007); *Rackoff v. State*, 637 S.E.2d 706, 709 (Ga. 2006); *State v. Marshall*, 163 P.3d 199, 204-05 (Haw. Ct. App.), *cert. denied*, 177 P.3d 1278 (Haw. 2007); *People v. Kim*, 859 N.E.2d 92, 93-94 (Ill. App. Ct. 2006), *appeal denied,* 871 N.E.2d 60 (Ill. 2007); *Jarrell v. State*, 852 N.E.2d 1022, 1025-26 (Ind. Ct. App. 2006); *Napier v. State*, 827 N.E.2d at 569; *Commonwealth v. Walther*, 189 S.W.3d 570, 572, 575 (Ky. 2006); *State v. Carter*, 114 P.3d 1001, 1007 (Mont. 2005); *State v. Fischer*, 726 N.W.2d 176, 182-83 (Neb. 2007); *People v. Lebrecht*, 823 N.Y.S.2d 824, 827-28 (N.Y. App. Div. 2006); *Green v. DeMarco*, 812 N.Y.S.2d 772, 777-78, 781-84 (N.Y. Sup. Ct. 2005); *State v. Shisler*, 2006 Ohio App. LEXIS 5251, at *11-14 (Ohio Ct. App. 2006); *State v. Norman*, 125 P.3d 15, 18-19 (Or. Ct. App. 2005), *rev. denied*, 132 P.3d 28 (Or. 2006). *But* see *Shiver v. State*, 900 So. 2d 615 (Fla. Ct. App. 2005).[1]

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[1] The breath test affidavits at issue in Florida contain not only maintenance records, but the actual results of the defendant's evidential breath testing. *Belvin v. State*, 2008 Fla. Lexis 758 at *4-5 (May 1, 2008). *See Bohsancurt v. Eisenberg*, 129 P.3d at 478 n.6. (distinguishing *Shiver v. State* because the Florida records include defendant's breath test results and a police officer's certification that another officer had calibrated and checked the Intoxilyzer).

Petitioners seek to dislodge routine breath test instrument maintenance records from their firmly rooted "business record" foundation by offering an expansive definition of "testimonial" that encompasses any document that is prepared with an awareness of its potential use in criminal litigation, irrespective of the main purpose of its preparation. But the near unanimous consensus is that a scope this broad is beyond the point of any meaningful constitutional significance, a point reflected by this commentator:

> [O]ne line of cases has struggled with whether certain kinds of fairly routine, ministerial documentation ought to be subject to *Crawford*. For example, breath test machines are typically required by statute to be calibrated on a regular basis, and when they are calibrated, the technician who does so typically fills out a form certifying that the calibration has been completed. Thus the issues arise . . . in a DUI case, can the document certifying that the machine was properly calibrated be admitted without giving the defendant the opportunity to confront the human being who conducted the calibration? *Does it really make sense that the Constitution requires the prosecutor to haul into court the technician who filled out this form, to confirm that*

she did what the certificate claims? When we require the person who is simply doing quality assurance tests on the machinery to come into court for each and every DUI trial, we may truly have gone too far.

Why so? What is the difference between calibrating an Intoxilyzer machine and conducting a DNA test? *The most salient distinction is that the former is done without a focus on any particular case.* As a number of courts have recognized, while the records created to establish calibration are made in expectation that they will be available for use in criminal trials, they are not created with an eye to any particular trial, any particular crime, or any particular defendant. . . . The calibration evidence neither exculpates nor inculpates; it is, rather, a foundational requirement. . . . *If evidence is developed not for any particular case, not with an eye toward inculpating any particular defendant, but rather as part of the routine quality control processes of law enforcement, perhaps it is not appropriate to deem it*

> *"testimonial" in the first place.*
>
> [Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause after Crawford v. Washington*, 15 J.L. & Pol'y 791, 846-47 (2007) (emphasis supplied)].

Indeed, some of the foundational documents petitioners challenge are, by their very nature, not directly involved with either the Alcotest or the periodic inspection of the instrument. Rather they attest to ancillary aspects, *e.g.*, the composition of a solution that will be used in the quality control process. These reports are not even generated by law enforcement breath testing coordinators, but by the manufacturer of the product. *State v. Chun*, 194 N.J. at 134-135, 943 A.2d at 161-62; Petition at 3. As such, these documents are yet another level removed from the certificates addressing such matters as calibration and inspection of the instrument. The logical extension of petitioners' argument would be that every person who verified some aspect of the testing of the instrument, even those who first assembled the instrumentation, would routinely be required to come into court as a condition of the readings' admissibility. *See State v. Maure*, 240 N.J. Super. 269, 283, 573 A.2d 186, 193 (App. Div. 1990), *aff'd o.b.*, 123 N.J. 457, 588 A.2d 383 (1991) ("Beyond such tests lie tests of the devices used to test other devices. These tests must end somewhere . . .") Neither the *Confrontation Clause* nor basic practicality commands such an accumulation of witnesses in judicial proceedings.

Petitioners allege that, although the documents at issue were not prepared with a particular DWI prosecution in mind, they nonetheless were prepared for the sole purpose of prosecuting individuals suspected of driving while intoxicated. Petitioners overlook the basic fact that instrumentation is

primarily inspected for the purpose of insuring its operability, but, even accepting their allegation as true, such a generally identified law enforcement use does not make routine inspection documents "testimonial." *Salt Lake City v. George*, 2008 Utah App. Lexis 248 (July 3, 2008) at *12-13 ("the practice of using affidavits [in DWI prosecutions] does not render the documents testimonial since the certificates/affidavits are prepared on a routine basis to test the accuracy of breath testing instruments in order to facilitate the repair, removal or decertification of such instruments, and are not prepared to be used to convict a particular defendant of a crime"); *State v. Fischer*, 726 N.W.2d 176, 183-184 (Neb. 2007) (Certificate verifying the concentration of breath testing simulator solution is not testimonial because statements in the certificate did not occur in the context of structured police questioning and do not pertain to any particular pending matter. The statements are required to be made as an administrative function whether or not the statements would eventually be used in any criminal prosecution); *People v. LeBrecht*, 823 N.Y.S.2d 824, 828 (N.Y. App. Div. 2006) (simulator solution certification and breath test maintenance/calibration records are not testimonial in that they were not created at official request to gather incriminating evidence against a particular individual). See, also, *United States v. Ellis*, 460 F.3d 920, 926-927 (7th Cir. 2006) ("it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially"); *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (where a statement is properly determined to be a business record . . . it is not testimonial within the meaning of *Crawford* even where the declarant is aware that it may be available for later use at trial").

One document -- the Alcotest's Alcohol Influence Report (AIR) -- is different from all other foundational documents challenged by petitioners in that it

memorializes not only the results of control tests run during administration of a defendant's tests, but the actual evidential breath test readings. The Supreme Court of New Jersey analyzed this document and concluded that the AIR, in its entirety, also was non-testimonial for *Crawford* purposes. *Id.*, 194 N.J. at 145-147, 943 A.2d at 169-70. Nevertheless, the court determined that, as an additional safeguard, it would require that the operator who administered a defendant's evidential breath tests be made available to testify in all contested matters. *Id.*, 194 N.J. at 140-141, 943 A.2d at 165-66. In light of the New Jersey Supreme Court's disposition (notwithstanding its earlier conclusion that the *Confrontation Clause* is not violated), the AIR's actual reporting of the breath test results presents no independent *Crawford* issue in petitioners' cases. The Alcotest operator will be present in court to testify about his or her administration of defendant's breath tests and will be subject to cross-examination.

Petitioners have failed to present any compelling reason requiring issuance of a writ of *certiorari*. Supreme Court Rule 10. There is no need for the Court to disturb the rational and settled judicial authority confirming *Crawford's* inapplicability to breath test instrument maintenance records. This Court's intervention is unwarranted.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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DATED: August 14, 2008